

(2015) 02 BOM CK 0346
In the Bombay High Court
Case No : Writ Petition No. 544 of 2014

Gajanan Bala Gawas and Others

APPELLANT

Vs

Sagun Narayan Morjkar

RESPONDENT

Date of Decision : 18-02-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2-A, 104

Citation : (2016) 2 ALLMR 277 : (2015) 5 BomCR 66

Hon'ble Judges : N.M. Jamdar, J.

Bench : Single Bench

Advocate : Nigel Da Costa Frias, for the Appellant; S.R. Rivankar, for the Respondent

Judgement

N.M. Jamdar, J.—Rule. Rule made returnable forthwith. Respondent waives service. Taken up for final disposal. The petitioners challenge the order passed by the District Judge, Goa dated 9 July 2014 dismissing the preliminary objection taken by the petitioner in respect of the maintainability of the Misc. Civil Appeal filed by the respondent.

2. The petitioners had filed a Civil Suit praying for an injunction against the respondents. On 24 October 2009, an order was passed by the learned Civil Judge Junior Division, granting injunction in favour of the petitioners. This order was confirmed by the District Judge in Misc. Civil Appeal. It is the case of the petitioners that thereafter the respondent obstructed the suit pathway. The petitioners accordingly filed an application under Order XXXIX Rule 2-A and 11 of Civil Procedure Code. The learned Civil Judge heard both sides in the application and by detailed order came to the conclusion that the respondent has obstructed the suit pathway and, accordingly, issued show cause notice to the respondent under Order XXXIX Rule 11 of the Civil Procedure Code. Thereafter, the respondent filed a Misc. Civil Appeal, in this Civil Appeal, the learned District Judge stayed the order passed by the learned Civil Judge dated 21 February 2013. The petitioners took an objection to the maintainability of the appeal which

the learned District Judge which was negated by the impugned order.

3. The learned Civil Judge by order dated 21 February 2013 had issued a show cause notice to the respondents under Order XXXIX Rule 11. There is no final order passed by the learned Civil Judge. Neither section 104 of the Civil Procedure Code nor Order XXXIII Rule 1 contemplate any Misc. Appeal from issuance of show cause notice under Order XXXIX Rule 11. The final order is yet to be passed by the learned Civil Judge. In the circumstances, an appeal to the District Court was clearly not maintainable.

4. Mr. S.R. Rivankar submitted that in the present case the conclusion is already reached by the learned Civil Judge and issuance of show cause notice is mere formality. Though there may be some substance in the contention of Mr. Rivankar that the learned Civil Judge has come to a final conclusion but, there is no final order passed under Order XXXIX, Rule 11.

5. The learned District Judge has erred in entertaining the appeal and granting stay to the proceedings before the Civil Judge. It is also not clear from the impugned order whether the learned District Judge has held appeal to be maintainable or has postponed the decision till the disposal of the appeal. Either course of action are not correct in law. First the appeal was not maintainable. Secondly, the learned District Judge ought to have considered the nature of the proceedings and what was at stake was allegation of disobedience of the order of the Court. By grant of stay in an appeal, which is not maintainable, the proceedings taken out in respect of breach of judicial order have been scuttled. The appropriate course of action would be to permit the learned Civil Judge to pass the final order in the matter and then entertain the appeal from such final order. In view of the above position, the petition succeeds. Rule is made absolute in terms of prayer clause (a). The interim relief granted by the learned District Judge stands vacated. The proceedings before the learned Civil Judge will continue as per law and the learned Civil Judge will pass final order in the proceedings. It will be open to the respondent to challenge the same as per law. All contentions of both the parties on merits are kept open. No costs.